

- (1) What is the nature and extent of claimant's disability, if any?

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Having reviewed the entire evidentiary record filed herein, and in addition the stipulations of the parties, the Appeals Board makes the following findings of fact and conclusions of law:

- (1) Claimant has suffered a sixty-four percent (64%) permanent partial general body work disability as a result of bilateral carpal tunnel syndrome suffered while employed with respondent.

Claimant, a sixty (60) year old high-school graduate with two (2) years of college from the University of Missouri, worked for respondent for approximately eight (8) years. As a laborer for respondent, claimant was involved in the construction of approximately five hundred (500) field coils per hour with the coils weighing approximately one (1) pound each. This job required forceful and repetitive use of both hands and arms.

On approximately April 8, 1991, and continuing through May or June, 1991, claimant developed problems in his left upper extremity. He was referred by the respondent to Dr. Mark Melhorn, an orthopedic surgeon in Wichita, Kansas. Dr. Melhorn, after a period of conservative care and testing, diagnosed bilateral carpal tunnel syndrome. Claimant had symptoms in his left hand involving pain, weakness and swelling, numbness and tingling in the three (3) small fingers, swelling in his wrist and pain in his hand. The pain did at times extend up into his elbow. Dr. Melhorn performed carpal tunnel surgery on claimant's left hand and wrist on May 29, 1991. Carpal tunnel surgery on the right hand was performed June 12, 1991. Approximately two (2) weeks after the surgery claimant was returned to work with the respondent. Subsequent to his return to work, claimant began developing additional problems and symptoms in both hands and wrists. Both hands hurt all of the time with elbow pain being intermittent. His hands are always cold and he has weakness of grip and ongoing pain in the lower three (3) fingers of both hands. Claimant attempted to continue working with respondent but was unable to do so even with accommodation and his employment with respondent was ultimately terminated.

Claimant has also had symptoms of impotence, diarrhea, hemorrhoids, stomachaches, back pains, chest pains, and shortness of breath. He was referred to Dr. Bernard Abrams for ongoing treatment. Dr. Abrams was unable to say within a reasonable degree of medical probability if these additional problems were related to his workers compensation injury but he did say they are all problems which developed since the injury. He did believe that the shortness of breath was due to claimant's lack of ability to do anything physical, indicating claimant was weak and rundown. There was also an indication in the record that claimant's impotence, diarrhea and shortness of breath may have been caused by medication prescribed by Dr. Abrams for the treatment of his ongoing carpal tunnel problems.

Respondent alleges claimant's carpal tunnel on the right upper extremity is not work related as claimant admitted to having no symptoms prior to the surgery by Dr. Melhorn. The respondent's argument fails due to the fact that Dr. Melhorn, the authorized treating physician, diagnosed bilateral carpal tunnel syndrome through the use of EMG tests on claimant's upper extremities. While claimant may have been asymptomatic in the right wrist, the medical records indicate early on he experienced symptoms in both elbows. It is also significant that Dr. Melhorn, having diagnosed carpal tunnel syndrome in both upper extremities, provided authorized treatment for both wrists. Claimant felt the surgery

performed by Dr. Melhorn was less than successful as the right wrist became symptomatic after the surgery and ultimately became more severe than the left. In Kansas where an injury is compensable under the Workers Compensation Act, any aggravation of that injury or additional injury arising from medical malpractice and the treatment thereof is a consequence of the primary injury and compensable under the Act. Roberts v. Krupka, 246 Kan. 433, 790 P.2d 422 (1990).

The logic of the Supreme Court in Krupka sides with the employee who, being a victim of medical malpractice or less than satisfactory medical treatment, is off work as a result, accumulating medical bills. As it is the respondent's right to choose the treating physician, it is only justice that the respondent also bear the burden should this choice of treating physician result in less than satisfactory treatment.

Dr. Abrams, who first examined claimant on November 18, 1991, diagnosed bilateral tenosynovitis, collagen-vascular disease and possible reflex sympathetic dystrophy. He found these conditions to be related to claimant's work with respondent, specifically indicating the bending and twisting on the job caused or aggravated his conditions. Claimant was referred for stellate ganglion blocks which proved to be unsuccessful. There was also, at one time, a recommendation for elbow surgery which claimant rejected, having been less than satisfied with the carpal tunnel surgery results. Dr. Abrams rated claimant at thirty to forty percent (30-40%) to each upper extremity. Dr. Abrams described claimant's condition as an unfortunate and non-medically negligent complication of carpal tunnel syndrome. Apparently he felt this was a scar tissue problem with the reflex sympathetic dystrophy developing as a possible complication of the carpal tunnel surgery. Dr. Abrams felt claimant's return to work within two (2) weeks of the surgery was too soon, which may have contributed to or caused claimant's ongoing problems. He felt claimant's ongoing cold complaints in his hands were a sign of causalgia minor, a less severe form of reflex sympathetic dystrophy. He indicated the cold-hand syndrome is not fakeable or createable by the claimant. It is a condition or symptom that is beyond the claimant's control.

Dr. Abrams utilized the American Medical Association Guides to the Evaluation of Permanent Impairment, Third Edition, Revised, in awarding the claimant a twenty-nine percent (29%) whole body functional impairment as a result of these injuries. He returned claimant to work with restrictions against upper extremity repetitive motion and advised that claimant avoid flexion and extension of the wrists, forceful gripping or twisting with the upper extremities, and lifting over ten (10) pounds on a regular basis. He admitted the treatment results on claimant had been less than successful.

When asked about claimant's contentions that he had no symptoms in his right upper extremity prior to surgery, Dr. Abrams noted that the May 2, 1991, report of Dr. Mark Melhorn indicated claimant had pain in his left arm and bilateral elbows, indicating claimant's original symptoms were bilateral.

Claimant was examined and evaluated by Stephen L. Sturdevant, Ph.D., a professional economist. Dr. Sturdevant, in evaluating claimant's injuries and limitations, felt claimant had lost eighty-seven percent (87%) of his ability to perform work in the open labor market. He felt claimant capable of earning \$4.50 an hour for a forty-hour week which, when compared to his stipulated average weekly wage of \$313.56, indicated a forty percent (40%) loss of ability to earn comparable wages. In reaching this opinion, Dr. Sturdevant considered claimant's ability to perform heavy, medium, light and sedentary work pre-injury but did not include the very heavy category from the Dictionary of Occupational Titles as claimant had apparently never performed work in that category. Dr.

Sturdevant opined claimant would be limited to sedentary work, post-injury. His evaluation was in part based upon the medical reports of Dr. Abrams.

K.S.A. 44-501(a) states in part:

“In proceedings under the workers compensation act, the burden of proof shall be on the claimant to establish the claimant's right to an award of compensation and to prove the various conditions on which the claimant's right depends.”

K.S.A. 44-508(g) defines burden of proof as follows:

“Burden of proof” means the burden of a party to persuade the trier of facts by a preponderance of the credible evidence that such party's position on an issue is more probably true than not true on the basis of the whole record.”

It is the function of the trier of fact to decide which testimony is more accurate and/or credible and to adjust the medical testimony along with the testimony of the claimant and any other testimony that may be relevant to the question of disability. The trier of fact is not bound by medical evidence presented in the case and has a responsibility of making its own determination. Tovar v. IBP, Inc., 15 Kan. App. 2d 782, 817 P.2d 212 (1991).

K.S.A. 1992 Supp. 44-510e(a) states in part:

“There shall be a presumption that the employee has no work disability if the employee engages in any work for wages comparable to the average gross weekly wage that the employee was earning at the time of the injury.”

The testimony of the claimant regarding his inability to return to his former employment is supported by the testimony of Dr. Bernard Abrams, who has placed specific and relatively limiting restrictions upon the claimant. The Appeals Board finds that, based upon a review of the entire record, claimant has proven by a preponderance of the credible evidence that the presumption of no work disability contained in K.S.A. 1992 Supp. 44-510e(a) has been overcome and claimant is entitled to work disability as a result.

The testimony of Dr. Stephen L. Sturdevant is uncontradicted. Uncontradicted evidence, which is not improbable or unreasonable, may not be disregarded unless it is shown to be untrustworthy. Anderson v. Kinsley Sand & Gravel, Inc., 221 Kan. 191, 558 P.2d 146 (1976).

K.S.A. 44-510e(a) defines permanent partial general disability as follows:

“The extent of permanent partial general disability shall be the extent, expressed as a percentage, to which the ability of the employee to perform work in the open labor market and to earn comparable wages has been reduced, taking into consideration the employee's education, training, experience and capacity for rehabilitation, except that in any event the extent of permanent partial general disability shall not be less than the percentage of functional impairment.”

While there is no legislative or court mandate that any specific formula be used to arrive at the extent of permanent partial general disability, the statute does require consideration of both factors when computing permanent partial disability. Schad v.

Hearthstone Nursing Center, 16 Kan. App. 2d 50, 816 P.2d 409, rev. denied 250 Kan. 806 (1991). As the statute is silent as to how this percentage is to be arrived at, use of both the reduction of claimant's ability to perform work in the open labor market and the ability to earn comparable wages must be considered in a manner deemed appropriate by the trier of fact. Hughes v. Inland Container Corp., 247 Kan. 407, 799 P.2d 1011 (1990); Tovar, *supra* at 785-786.

As there is no evidence to contradict the opinion of Dr. Sturdevant regarding claimant's eighty-seven percent (87%) loss of access to the open labor market and forty percent (40%) loss of ability to earn comparable wage, the Appeals Board finds this evidence to be competent and adopts same.

The Appeals Board further finds that there is no justifiable reason to place emphasis on one factor greater than the other and applies equal emphasis to each. In comparing claimant's loss of access to the open labor market of eighty-seven percent (87%) and his loss of ability to earn comparable wages of forty percent (40%), the Appeals Board finds claimant has suffered a sixty-four percent (64%) permanent partial general work disability.

AWARD

WHEREFORE, it is the finding, decision, and order of the Appeals Board that the Award of Special Administrative Law Judge William F. Morrissey, dated March 1, 1994, should be and is affirmed in all respects and an award of compensation is granted in favor of the claimant, Ardell Moore, and against the respondent, Ace Electric Company, a qualified self-insured, and the Kansas Workers Compensation Fund.

Claimant is entitled to 53.43 weeks of temporary total disability compensation at the rate of \$209.05 per week based upon an average weekly wage of \$315.56 in the sum of \$11,169.54, followed by 361.57 weeks of permanent partial disability compensation at the rate of \$133.79 per week in the sum of \$48,374.45 for a 64% permanent partial general body work disability, making a total award of \$59,543.99.

As of September 6, 1994, there would be due and owing to the claimant 53.43 weeks of temporary total disability compensation at the rate of \$209.05 per week in the sum of \$11,169.54, followed thereafter by 115.71 weeks permanent partial general body disability compensation at the rate of \$133.79 per week in the sum of \$15,480.84, totalling \$26,650.38 due and owing in one lump sum minus any amounts previously paid. Followed thereafter by 245.86 weeks of permanent partial general body work disability at the rate of \$133.79 per week totalling \$32,893.61, until fully paid or until further order of the Director.

Claimant is awarded unauthorized medical up to \$350.00 upon presentation of itemized statement verifying same.

Claimant's contract of employment with his attorney is approved subject to the provisions of K.S.A. 44-536.

Fees and expenses of the administration of the Kansas Workers Compensation Act are assessed 75% to the respondent and 25% to the Kansas Workers Compensation Fund to be paid direct as follows:

William F. Morrissey
Special Administrative Law Judge

\$150.00

Patricia K. Smith	
Transcript of Preliminary Hearing (11-21-91)	\$75.35
Deposition of Stephen L. Sturdevant	\$143.00
Martin D. Delmont	
Transcript of Preliminary Hearing (2-27-92)	\$94.65
Transcript of Regular Hearing	\$71.20
Karen Starkey	
Deposition of Ardell Moore	Unknown
Hostetler & Associates	
Deposition of Bernard M. Abrams, M.D.	\$291.75

IT IS SO ORDERED.

Dated this ____ day of September, 1994.

BOARD MEMBER

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William F. Morrissey, Special Administrative Law Judge
George Gomez, Director